Supreme Court, U.S.
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No. 91-2014

In The Supreme Court Of The United States

OCTOBER TERM, 1991

O'NEILL GROUP, et al., *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

PETITIONERS' REPLY

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I. Respondent's Brief In Opposition Fails To Address Several Key Points In The Petition For Writ Of Certiorari.

This case concerns the proper measure of contract rejection damages under section 502 of the Bankruptcy Code. Petitioners, a large group of former and present pilots and flight attendants at Continental Airlines, maintain that the Fifth Circuit mismeasured their contract rejection damages in a fashion that is inconsistent with this Court's previous rulings and with basic principles of labor and bankruptcy law. Respondent Continental Airlines, the bankrupt employer that rejected its long-standing labor contracts with the pilots and flight attendants, contends that the Fifth Circuit decision was perfect in all respects.

Respondent's brief is notable for its failure to address three critical points. First, respondent's brief does not attempt to explain how the Fifth Circuit decision can be reconciled with this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Addressing § 502(c)(2) of the Bankruptcy Code, *Bildisco* expressly held that job rights such as seniority were compensable as contract rejection damages. *Id.* at 530 n.12. As there is no practical distinction between seniority in *Bildisco* and wages here — both accrue only if the employer continues to operate — the Fifth Circuit's added condition that employees prove a guarantee of continued employment before receiving contract rejection damages is clearly inconsistent with this Court's analysis in *Bildisco*.[1]

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[1] The Fifth Circuit decision also expands the powers of the bankruptcy courts beyond what is allowed by the plain language of the Code, authorizing them to consider what would have happened absent the rejection or to disallow damages for contracts that would have otherwise caused the debtor to cease operations. This Court has repeatedly rejected similar attempts to expand the powers of bankruptcy courts beyond what is expressly provided for in the Code. *See Union Bank v. Wolas*, 112 S. Ct. 527 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

Second, respondent's brief does not try to explain how the bankruptcy laws can be construed to allow a debtor to finance its recovery on the backs of a discrete group of creditors, in this case its employees. Respondent concedes that Continental paid all of its unsecured creditors in full, including those whose contracts it rejected, with the singular exception of the pilots and flight attendants. This group received virtually nothing, even though the demise of the airline would have affected all unsecured creditors equally.

Third, respondent's brief does not address the increase in the number of bankruptcy filings by major employers, with the concomitant risk that this issue will recur in another case again affecting a large body of workers. Combined with respondent's admission that § 1113 of the Bankruptcy Code does not address the issue of how to measure contract rejection damages, there is no reason whatsoever why the first appellate case should not be decided correctly.[2] Therefore, the Court should grant the petition for a writ of certiorari to enunciate the proper measure of contract rejection damages as foreshadowed in *Bildisco*.

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[2] Respondent urges this case is not particularly significant because (1) most of the petitioners have settled and (2) § 1113 of the Bankruptcy Code reduces the likelihood that this dispute will arise again. As to the settlement, respondent neglects to instruct the Court that it is not yet final, and will not be final, until Continental emerges from bankruptcy. Continental is currently in its second bankruptcy in less than a decade, and has remained under the protection of Chapter 11 for the last eighteen months without filing a plan of reorganization. Thus, to divest more than 450 pilots of their still-viable claims because of the settlement is premature.

As to § 1113, it simply will not prevent the same question from arising again. In fact, it would not have had any effect in this case. All § 1113 does is prescribe a procedure for the rejection or modification of an existing collective bargaining agreement, requiring the employer to "confer in good faith." 11 U.S.C. §§ 1113(b) & 1113(e). Sections 1113(b) and (e) say nothing about the proper measurement of contract rejection damages once a collective bargaining agreement is rejected.

II. Respondent's Brief Contains Several Misstatements Of Fact And Of Law.

As to the points respondent's brief actually addresses, at least three merit a brief reply because they contain misstatements of fact or law.

A. Petitioners Are Not Collaterally Estopped from Asserting a Constructive Discharge.

Respondent incorrectly suggests petitioners are collaterally estopped from alleging that Continental's unilateral changes in their working conditions constituted a constructive discharge by the decision in *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D.Tex. 1985). In *In re Continental*, the court held that no claim in bankruptcy existed for wrongful discharge arising from the rejection of a labor contract because such claims had to be presented as contract rejection claims under § 502. *Id.* at 850. To rely on *In re Continental* as a bar in this action would place petitioners in an unjust catch-22: they would not have a remedy for contract rejection because they were not constructively discharged, but they also could not pursue a constructive discharge claim because contract rejection damages are the exclusive remedy.

Further, the wrongful discharge finding in *In re Continental* has been appealed. As noted in *In re Continental*, it was first held that there was no constructive discharge when Judge Roberts granted Continental's summary judgment motion on the pilots' contract rejection claim. That order is the subject of this appeal, and the petitioners clearly should not be required to appeal a later determination of the same conclusion which is already under appeal.

B. Labor Law Permits Strikers to Recover Back Wages.

Contrary to respondent's suggestion, courts have regularly held that, under circumstances applicable here, strikers can recover back pay for the period that they were on strike. As noted in the petition, back pay is appropriate when employees strike in

response to certain unfair labor practices, such as when the employer drastically alters the terms of employment. *See, e.g., NLRB v. Haberman Constr. Co.*, 618 F.2d 288 (5th Cir. 1980), *aff'd in relevant part en banc*, 641 F.2d 351 (5th Cir. 1981). Continental engaged in just such an unfair labor practice when it slashed the pilots' wages and benefits in half under its emergency work rules.[3]

C. The Fifth Circuit's Decision Awards Continental a Windfall.

Respondent does not cite any authority, and there is none, for the "rule" that an employee's refusal to work for reduced wages terminates his claim for back wages in its entirety. To the contrary, in his dissent, Judge Garwood correctly stated the established law. An employee's failure to mitigate damages simply reduces his recovery; it does not eliminate damages altogether as the Fifth Circuit held. *See* E. Farnsworth, *Contracts* § 12.12, at 858-62 (1982). This difference between reduction and elimination is the windfall reaped by Continental under the Fifth Circuit's decision, as the court required the pilots to work under Continental's diminished wage scale or forfeit all rejection damages.

Another windfall is the Fifth Circuit's limitation of contract damages to the six days the bankruptcy court thought the airline would remain operational without the rejection of the labor contracts.[4] This too misses the point. The fact is that Continental remained in business, flew out of bankruptcy, and honored all of

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[3] Under *Bildisco*, the remedy is still contract rejection damages, not injunctive relief or other unfair labor practice remedies. *Bildisco*, 465 U.S. at 530. *See Mungin v. Florida East Coast Ry.*, 416 F.2d 1169 (5th Cir. 1969) (enumerating remedies for unfair labor practices under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*).

[4] To the extent this case turns on critical issues of fact left to the discretion of Judge Roberts, a rehearing is necessary. A conflict was created in the proceedings below when Continental's local bankruptcy counsel extended to Judge Roberts an offer of employment, admittedly "before the rulings" on appeal here, and he accepted the offer immediately after awarding Continental $700,000 in fees. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261-63 (5th Cir. 1990).

its rejected contracts in full, except for petitioners' labor contract. Respondent provides no reason why it should be allowed to prefer other creditors over these employee claimants. There simply is none.

CONCLUSION

The strong grounds presented in the petition showing the national importance of granting certiorari have in no way been diminished by the brief in opposition. With the growing number of bankruptcy filings by major companies and the large number of employees with collective bargaining agreements affected thereby, it is vital that the Court address the issue of how to correctly measure contract rejection damages now. The fundamentally unjust and harsh rule advocated by the Fifth Circuit, which is in serious conflict with basic labor and bankruptcy law, cannot be allowed to lead the way.

RESPECTFULLY SUBMITTED, July 1992.

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